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NO. 89-960

In the Supreme Court of the United States

OCTOBER TERM, 1989

TIDELAND WELDING SERVICE and
LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners

v.

WALTER SAWYER, GLYNN RHODES and
DIRECTOR, OFFICE OF WORKERS COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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60 pp

QUESTION PRESENTED FOR REVIEW

Did the Fifth Circuit err in dismissing the Petitioners' appeal by relying on a procedure unauthorized by the Administrative Agency's regulations, the effect of which denies the Petitioners their right to have the substantive issues, including the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act, heard by an Article III Court, and err by refusing to defer to the Benefits Review Board's own reasonable construction of its regulations.

LIST OF ALL PARTIES

TIDELAND WELDING SERVICE

LIBERTY MUTUAL INSURANCE COMPANY

WALTER SAWYER

GLENN RHODES

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

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33 U.S.C. §901, et seq.

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PETITION FOR A WRIT OF CERTIORARI

Tideland Welding Service and Liberty Mutual Insurance Company, Petitioners,

hereby petition this Court to issue a Writ of Certiorari to review the decision of the United States Fifth Circuit Court of Appeals entered on August 24, 1989, rehearing denied September 18, 1989, in the proceeding entitled "Tideland Welding Service and Liberty Mutual Insurance Company versus Walter Sawyer, Glynn Rhodes and Director, Office of Workers Compensation Programs, United States Department of Labor," No. 88-4280 of the docket of said Court, and reported at 881 F.2d 157.

OPINIONS BELOW

The Benefits Review Board's Order of April 22, 1987, is reprinted as Appendix A. The decision entered by the Fifth Circuit, reported at 881 F.2d 157, is reproduced as Appendix B; the order denying rehearing or rehearing en banc is

reproduced as Appendix C.

JURISDICTIONAL GROUNDS

Jurisdiction in the United States Fifth Circuit was pursuant to the Longshoremen's and Harbor Workers' Act, 33 U.S.C. §921, a final order having been entered by the Benefits Review Board. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The decision sought to be reviewed, 881 F.2d 157, was rendered August 24, 1989; the order denying rehearing or rehearing en banc was filed on September 18, 1989. See 28 U.S.C. §2101(c); Rule of the Supreme Court of the United States 20.4.

STATUTORY PROVISIONS INVOLVED

20 C.F.R. §802.205A is the statutory regulation pertinent here. The relevant portions of 20 C.F.R. §802.205A, as written during the applicable time, reads:

(a) A timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner shall suspend the filing of the time for filing a notice of appeal.

(b) (1) In a case involving a claim filed under the Longshoremen's and Harbor Worker's Compensation Act or its extensions (see §802.101(b)(1) - (5)), a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than ten days from the date the decision or order was filed in the office of the deputy commissioner.

. . . .

(c) If a motion for reconsideration is granted, the full time for filing an appeal commences on the date the subsequent decision or order on reconsideration is filed as provided in

§802.205.

(d) If a motion for reconsideration is denied, the full time for filing an appeal commences on the date the order denying reconsideration is filed as provided in §802.205.

(e) If a timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed as premature. Following final action by the administrative law judge or deputy commissioner pursuant to either paragraph (c) or (d) of this section, a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal.

STATEMENT OF THE CASE, COURSE OF PROCEEDINGS, AND STATEMENT OF FACTS

This Petition follows a lengthy and complicated trip through the procedures of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. A brief recitation of the facts follow.

Tideland Welding Service employed Walter Sawyer and Glenn Rhodes as welders in 1980. Liberty Mutual insured Tideland for both state workers compensation and the Longshoremen's and Harbor Workers' Compensation Act. On June 21, 1980, Sawyer and Rhodes were temporarily assigned to weld at the McDermott Shipyard facility in Morgan City, Louisiana. Due to rain, they were given permission to leave for the day. Sawyer and Rhodes left

the McDermott yard in a car owned and driven by Rhodes and were on U.S. Highway 90, the main road between Morgan City and New Orleans. Approximately one and a half miles from where they worked they were involved in a head-on collision, resulting in their injuries.

Sawyer and Rhodes sought compensation benefits under the LHWCA. Benefits were paid, although Tideland and Liberty Mutual disputed that the accident satisfied the situs test of the Act.

The claim was presented to Deputy Commissioner Glenn H. Woodley and on June 5, 1981, the Deputy Commissioner found that the claimants failed to satisfy the situs requirement of the Act. Thereafter a full hearing was held before Administrative Law Judge Ben H. Walley. Judge Walley rendered a written opinion

also, finding that the situs requirement of the Act was not satisfied. The Judge found no nexus between McDermott's waterfront activities and Highway 90. Also, after hearing live testimony, Judge Walley found the "trip payment exception" inapplicable. Based on Judge Walley's Decision and Order, Tideland and Liberty Mutual ceased paying benefits.

The claimants appealed the Administrative Law Judge's Decision and Order to the Benefits Review Board. The matter was argued to the Board on November 10, 1983, and on May 9, 1984, the Board reversed Judge Walley's decision, substituting its own factual determination to find situs and employment status. The Board remanded the case to Judge Walley to determine disability.

On May 29, 1984, Tideland and Liberty Mutual filed an appeal with the U.S. Fifth Circuit, docket number 84-4361. The Director, OWCP moved to dismiss the appeal on the basis that the Board's May 9, 1984, decision and order was not a "final order" subject to review. Sawyer, Rhodes, Tideland and Liberty Mutual all opposed the Director; however, the Fifth Circuit agreed with the Director and dismissed the appeal.

Thereafter, the case was remanded to Judge Walley for a medical and disability hearing. More delays were encountered when the Board inadvertently transferred the file to the Black Lung Program. Finally the file was located and the Administrative Law Judge held a hearing. On November 25, 1986, the ALJ ruled that Sawyer was entitled to weekly benefits of

$376.00 per week and that Rhodes was entitled to benefits of $270.00 per week. Because prior rulings had denied coverage, Liberty Mutual had ceased paying compensation in 1983, and therefore was ordered by the ALJ to pay Sawyer $100,000.00 and Rhodes $30,000.00 by December 6, 1986. These awards represented accrued, unpaid periodic compensation. Thus, by December 5, 1986, Tideland and Liberty Mutual were required to pay over $130,000.00 to the claimants or face a twenty percent penalty pursuant to 33 U.S.C. §914(f).

Believing they were being denied procedural due process because they were required to turn over property before a hearing was held before an Article III Court, Tideland and Liberty Mutual filed an Emergency Motion for a Stay and a

Petition for Review with the Fifth Circuit. At the same time, Liberty Mutual petitioned the Board to Stay the payment of the award. The Board construed the Motion as a Notice of Appeal from the ALJ's November 5, 1986, Order and on December 8, 1986, denied the request for a Stay. Meanwhile, the Fifth Circuit granted the Emergency Motion to Stay and set the case for expedited review.

On April 6, 1987, a panel of the Fifth Circuit heard oral argument on Petitioners' contentions and whether or not the Court had jurisdiction to hear the case. In an opinion reported at 817 F.2d 1211, the Fifth Circuit held that it lacked jurisdiction because the Board had not yet issued a "final order." The Court noted that Petitioners could assert their constitutional claims once the Board

entered its "final order." 817 F.2d at 1212. Because the Court vacated the stay, petitioners paid the claimants over $130,000.00 in a lump sum. No Article III Judge had nor has yet reviewed the Board's decision on the merits.

In the meantime, Sawyers and Rhodes contested the ALJ's award as inadequate. They initially filed a Motion for Reconsideration of the Award on December 5, 1986, but later withdrew the Motion and appealed to the Board on January 6, 1987. The ALJ granted the Motion to Withdraw on January 13, 1987. In April 1987, the Board dismissed the claimants' appeal as untimely. See Appendix A.

In March 1988, the Board issued a final order, affirming its prior holdings and rejecting the Petitioners' constitutional claims. The Petitioners

then appealed to the Fifth Circuit pursuant to that Court's appellate jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §921(c). After oral argument, Judges Thornberry, Williams, and Davis by decision dated August 24, 1989, vacated the order of the Benefits Review Board which had construed the Petitioners' appeal as timely, and dismissed Tideland's and Liberty Mutual's appeal. The Fifth Circuit panel concluded that Sawyer's and Rhodes' Motion for Reconsideration, despite its subsequent withdrawal by the claimants, voided the Petitioners' appeal to the Board. Tideland Welding and Liberty Mutual filed a Petition for Rehearing which was denied on September 18, 1989.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit erred in dismissing the Petitioners' appeal by relying on a procedure unauthorized by the Board's regulations, the effect of which denied the Petitioners' right to have the substantive issues, including the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act, heard by an Article III Court, and erred by refusing to defer to the Board's own reasonable construction of its procedural regulations.

The Fifth Circuit's decision misapplies the governing procedures before the Administrative Law Judges and the Benefits Review Board, fails to adhere to the established jurisprudence requiring deference to the Board's interpreting and enforcing its rules and regulations, and deprives Petitioners of their constitutional right to due process. The Court's erroneous construction of the administrative procedures specifically deprives the Petitioners of their only

opportunity for review by an Article III Court of the issues repeatedly sought to be heard, namely the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act, specifically §921(b)(3), and the situs aspect of the case.

The Petitioners have been denied their right to have the substantive issues of this long-suffering case heard by an Article III Court because of an unauthorized procedure used by the claimants Sawyer and Rhodes before the Administrative Law Judge. This is wrong and must not deprive the Petitioners of their appeal rights, the only chance for review on the merits by an Article III Court. The Court's holding is especially egregious where Sawyer's and Rhodes' unauthorized procedure is not set forth in the regulations, and under analogous

precedent, would not render the Petitioners' appeal untimely in any event.

The pertinent Code of Federal Regulations is 20 C.F.R. §802.205A. The portion of the regulation concerning the effect of a motion for reconsideration on the time for appeal is in §802.205A, reprinted again here:

> (a) A timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner shall suspend the filing of the time for filing a notice of appeal.
>
> (b) (1) In a case involving a claim filed under the Longshoremen's and Harbor Worker's Compensation Act or its extensions (see §802.101(b)(1) - (5)), a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than ten days from the date the

decision or order was filed in the office of the deputy commissioner.

. . . .

(c) If a motion for reconsideration is granted, the full time for filing an appeal commences on the date the subsequent decision or order on reconsideration is filed as provided in §802.205.

(d) If a motion for reconsideration is denied, the full time for filing an appeal commences on the date the order denying reconsideration is filed as provided in §802.205.

(e) If a timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed as

> premature. Following final action by the administrative law judge or deputy commissioner pursuant to either paragraph (c) or (d) of this section, a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal.

The Fifth Circuit failed to distinguish between what procedures are authorized from what procedures are not authorized. There is no regulation providing for the withdrawal of a motion nor addressing the effect thereof.

The significance of 20 C.F.R. §802.205A, quoted above, and the absence of a regulation authorizing the withdrawal of a motion raised before the ALJ, is that the Court held that the Board "deviated" from its regulations regarding commencement of appeal time. The Board

could not, however, deviate from a regulation which did not exist. Section 802.205A provides only two alternatives for recommencing the time within which to file a notice of appeal. Those two are the granting of the motion for reconsideration and entry of a subsequent order, §802.205A(c), or the denial of the motion for reconsideration, §802.205A(d). Neither occurred, and the Court failed to acknowledge that only those two alternatives existed.

Importantly, the Fifth Circuit noted that "the regulation makes no exception for motions for reconsideration that are later withdrawn." Tideland Welding Service, et al v. Sawyer, et al, 881 F.2d 157, 160 (5th Cir. 1989). Failure of the regulation to make that exception is understandable, because withdrawal was a

procedure not authorized by the regulations.

If the result of withdrawing the Motion for Reconsideration is for the purposes of §802.205A that no motion was filed at all, then as the Board recognized the appeal filed by the Petitioners on December 3, 1986, was timely. If, on the other hand, despite the use of an unauthorized procedure--the withdrawal of the Motion for Reconsideration--the appeal is considered premature, the absurd result is that the time for appealing never recommenced as provided in §802.205A(c) and (d), and the Petitioners' only hope to have the original order reviewed by an Article III Court descended into procedural limbo. See §802.205A(e).

The Fifth Circuit itself has recognized that where an unauthorized

procedure is employed in proceedings below, the rights of parties to appeal are not thereby prejudiced. In Wheeler v. American Home Products Corp., 582 F.2d 891 (5th Cir. 1977), the District Court failed to comply with Federal Rule of Civil Procedure 58 by following a dismissal procedure not authorized: no separate judgment ordered the dismissal of an intervenor's claims when the principal demand was dismissed. The intervenor filed a Notice of Appeal. Subsequently, the order was amended to comply with Rule 58, entering a separate judgment dismissing the intervenor's claims. Despite the later amendment and entry of the order, the Fifth Circuit held that "the filing of the earlier notice of appeal is deemed under the circumstances to be a sufficient compliance with

Fed.R.Civ.P. 58." Wheeler, 582 F.2d at 893. Like Wheeler, the Petitioners had no control over the actions of Sawyer and Rhodes "withdrawing" their motion, nor of the ALJ's entertaining the withdrawal.

By analogy, in lawsuits "[a] voluntary dismissal without prejudice leaves the situation as if the action had never been filed." Wright & Miller, Federal Practice & Procedure, §2367, p. 186. The result is that any interruption of an applicable statute of limitation is retroactively eliminated, and the plaintiff may find himself time barred from his day in Court as in Taylor v. Bunge Corporation, 775 F.2d 617, 619 (5th Cir. 1985).

In accordance with these general principles, the Board correctly analogized its earlier decision of Niswander v.

Director, Office of Worker's Compensation Programs, 7 BLR 1-88 (1984), to determine that an abandoned motion for reconsideration did not suspend the running of the appeal time.

The Fifth Circuit recognized, yet ignored, that the rules and regulations of the Board deserve special deference. Tideland, 881 F.2d at 161. Indeed, this very Court has consistently cautioned reviewing courts "against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 525, 98 S.Ct. 1197, 1202 (1978). See also Jones v. Illinois Central Gulf R.R., 846 F.2d 1099, 1100-01 (7th Cir. 1988)(cited by the Fifth Circuit in Tideland, 881 F.2d

at 161).

The Fifth Circuit in the past has noted that an agency's procedural compliance is subject to closer scrutiny than an agency's rule making decisions. Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477, 1485-86 (5th Cir. 1983). Nevertheless, said the Fifth Circuit, "the ultimate question remains whether or not the agency's action was arbitrary and capricious, that is, unreasonable." Id., 1486.

Here, the Board's construction of 20 C.F.R. 802.205A was neither arbitrary nor capricious. It was the Fifth Circuit which arbitrarily ignored the only two operative provisions of 20 CFR 802.205A:

> (c) If a motion for reconsideration is granted, the full time for filing an appeal commences on the date the subsequent decision or order on reconsideration is filed. . .

or

> (d) If a motion for reconsideration is denied, the full time for filing an appeal commences on the date the order denying reconsideration is filed. . . .

The ALJ neither granted nor denied the claimant's Motion for Reconsideration. Therefore, no new time commenced to file an appeal and that is why the claimants' appeal was untimely; they failed to file an appeal to the Board within thirty days of November 25, 1986, the date on which the ALJ entered his judgment. 33 U.S.C. §921(a). Only Tideland and Liberty Mutual complied.

In this case, the Board did not violate its rules, nor was there any resulting prejudice. The only prejudice occurred when the Fifth Circuit "engraft[ed] their own notions of proper

procedures" which denied Tideland and Liberty Mutual their appeal rights. As the Seventh Circuit said in Cook v. Director, Office of Worker's Compensation Programs, 816 F.2d 1182, 1187 (7th Cir. 1987), "...close cases of interpretation of an administrative regulation must be resolved in favor of the administrator's interpretation. . . ."

This case is not even a "close case of interpretation" of the regulations. As set forth above, withdrawal of a motion for reconsideration was not envisioned by the regulations. Contrary to the Fifth Circuit's decision, the Board could not "deviate" from such a regulation, because it did not exist.

It is important that in each of the cases cited by the lower Court which reversed Board procedural decisions, the

Court faced circumstances falling within the regulation's plain wording. Those cases did not involve interpreting a regulation where more than one reasonable construction was available nor where the regulation did not apply to the case.

CONCLUSION

The issue presented here is not merely construing an administrative agency's procedural rule. The case involves much more. The Petitioners do not believe that the claimants satisfy the situs test for coverage under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. See e.g., Texports Stevedore Company v Winchester, 632 F.2d 504 (5th Cir. 1980).

The Petitioners have sought review before an Article III Court of the Board's holding in favor of the claimants for

years. Moreover, the Petitioners have raised serious questions about the constitutionality of 33 U.S.C. §921, which forces an employer to part with property--money--to a third party--a claimant--before any review is available before an Article III court. Certainly, "it is too late in the day . . . for decisions on the merits to be avoided on the basis of . . . mere technicalities." Foreman v. Davis, 371 U.S. 178, 181-82, 83 S.Ct 227, 230 (1962). This quotation is even more appropriate here, where the Fifth Circuit engrafted the "technicality" onto the procedure ex post facto.

For the above reasons, Tideland and Liberty Mutual request this Court to grant their Petition for Writ of Certiorari and to reverse the Fifth Circuit's decision.

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CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the above and foregoing have been served upon counsel of record by depositing same in the United States Mail, postage paid, this

_____day of December, 1989.

KEVIN R. TULLY

APPENDIX A
BENEFITS REVIEW BOARD

WALTER SAWYER	)	BRB Nos. 86-3048
	)	and 86-3048A
	)	Case No. 81-LHCA-2135
	)	OWCP No. 7-71798
Claimant-Respondent	)	
Cross Petitioner	)	
	)	
v.	)	
	)	
TIDELAND WELDING SERVICE	)	
and	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondent	)	
	)	
GLYNN RHODES	)	BRB Nos. 86-3049
	)	and 86-3049A
	)	Case No. 81-LHCA-2136
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
TIDELAND WELDING SERVICE	)	
and	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	ORDER

The Board acknowledges receipt of claimants' consolidated Notice of Appeal in the captioned case. Claimants appeal the administrative law judge's Decisions and Orders, filed November 25, 1986 and Order on Reconsideration, filed January 13, 1987. The appeals have been assigned the Board's docket numbers BRB No. 86-3048A, with respect to claimant Sawyer, and BRB No. 86-3029A with respect to claimant Rhodes. Any future correspondence concerning claimants' appeals must bear these numbers.

On November 25, 1986, the administrative law judge's Decisions and Orders on Remand-Award of Benefits were filed in the Office of the Deputy Commissioner in the above-captioned cases. Employer/carrier thereafter filed a Motion for Stay of Payments and supporting

memorandum. By Order dated December 8, 1986, the Board also considered employer's motion to be an appeal of the administrative law judge's Decisions and Orders, filed November 25, 1986. By the same Order, employer/carrier's motion for stay of payments was denied and the case was set for expedited review.

On December 5, 1986, claimants filed a motion for reconsideration of the administrative law judge's Decisions and Orders, filed November 25, 1986. Ten days later, claimants filed a motion to withdraw their motion for reconsideration. Claimants then filed a Notice of Appeal on January 6, 1987. The administrative law judge in his Order, filed January 13, 1987, granted claimants' request to withdraw their motion for reconsideration of the initial Decisions and Orders.

Pursuant to Section 802.205A(a) of the Board's Rules of Practice and Procedure, 20 C.F.R. §802.205A(a), a timely motion for reconsideration of a decision or order of the administrative law judge shall suspend the time for filing a notice of appeal. 20 C.F.R. §802.205. However, the Board has held that if a party elects to file a motion for reconsideration rather than file its appeal before the Board, it cannot thereafter abandon its motion for reconsideration and have its appeal time to the Board extended by the abandoned motion. See Niswander v. Director, OWCP, 7 BLR 1-88 (1984). This is particularly true where claimants by filing and then withdrawing a motion for reconsideration have potentially rendered employer's appeal premature and subject to dismissal.

20 C.F.R. §802.205A(a). Since claimants withdrew their motion, we view it as without effect. Therefore, the appeal time began to run on November 25, 1986. We note that even if we viewed the motion for reconsideration as effective, claimants' appeals are nonetheless untimely because filed prior to the administrative law judge's Order on the Motions.

In view of the foregoing, claimants' appeals, BRB No. 86-3048A (Sawyer) and BRB No. 86-3049A (Rhodes), are dismissed as untimely filed. 20 C.F.R. §802.205.

The Board has received a consolidated Petition for Review and brief filed by employer/carrier, petitioners in BRB Nos. 86-3048 and 86-3049. 20 C.F.R. §802.210. Response briefs may be filed within thirty (30) days from receipt of this Order. 20 C.F.R. §802.211.

ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

Dated this 22nd
Day of April 1987

APPENDIX B

TIDELAND WELDING SERVICE and
LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners

VS. NO. 88-4280

WALTER SAWYER, GLYNN RHODES and
DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS, U.S.
DEPARTMENT OF LABOR,
Respondents

United States Court of Appeals,
Fifth Circuit

August 24, 1989
Rehearing and Rehearing En Banc
Denied September 18, 1989

Injured workers sought to recover compensation under Longshoremen's and Harbor Workers' Compensation Act. The Benefits Review Board affirmed award of benefits, and appeal was taken. The Court of Appeals, Thornberry, Circuit Judge, held that time for filing notice of appeal

was measured from date administrative law judge ruled on motion to withdraw motion for reconsideration.

Vacated; appeal dismissed.

Workers' Compensation 1877

For purpose of appealing award or denial of compensation under Longshoremen's and Harbor Workers' Compensation Act, time for filing notice of appeal is measured from date administrative law judge rules on motion to withdraw motion for reconsideration.

Kevin R. Tully, Robert E. Peyton, Christovich & Kearney, New Orleans, for petitioners.

Lawrence A. Arcell, Barker, Boudreaux, Lamy & Foley, New Orleans, Joshua T. Gillelan, II, Washington D.C., for respondents.

Linda M. Meekins, Clerk, BRB, Department of Labor, Washington, D.C., for other interested parties.

Petition For Review of Orders of the Benefits Review Board.

Before THORNBERRY, WILLIAMS, and DAVIS, Circuit Judges.

THORNBERRY, Circuit Judge:

The petitioners Tideland Welding Service ("Tideland") and Liberty Mutual Insurance Company ("Liberty Mutual") appeal a Benefits Review Board ("the Board") finding that the respondents Walter Sawyer ("Sawyer") and Glynn Rhodes ("Rhodes") were entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).

In 1980, Tideland employed Sawyer and Rhodes as welders assigned to the McDermott Shipyard in Morgan City, Louisiana. On June 21, 1980, Tideland excused the respondents from work early due to heavy rain. While travelling in the same car on U.S. 90, the respondents were injured in a collision, which

occurred just under two miles from where they worked.

Sawyer and Rhodes sought compensation pursuant to the LHWCA. The Deputy Commissioner of the Department of Labor denied their claims. An Administrative Law Judge ("the ALJ") later held a full hearing and, in December 1982, found that the place where the accident occurred did not constitute a maritime situs and that the respondents were not in the course or their employment at the time of the accident. Sawyer and Rhodes appealed the ALJ's decision to the Board. In May 1984, the Board reversed the ALJ, finding that the accident occurred on a covered situs and that the respondents were in the course of their employment. The Board remanded the case to the ALJ to determine the measure of compensation to which the

respondents were entitled.

Tideland and Liberty Mutual[1] then appealed the Board's decision to this court. We held that the Board's decision was not a final order subject to appellate review.

On November 25, 1986, on remand, the ALJ ruled that Sawyer was entitled to weekly benefits of $376.00 per week and that Rhodes was entitled to benefits of $270.00 per week. Because Liberty Mutual had not paid anything to the respondents since 1983, the ALJ ordered Liberty Mutual to pay Sawyer $100,000 and Rhodes $30,000 by December 6, 1986. These awards represented accrued unpaid periodic compensation.

---

[1]Hereafter, when referring to Liberty Mutual we are referring to the collective actions of Liberty Mutual and Tideland.

In early December 1986, Liberty Mutual petitioned the Board to stay the payment of the award. The Board construed the motion as a notice of appeal from the ALJ's November 25, 1986 order and on December 8, 1986 denied the request for a stay.

Between the time Liberty Mutual sent its motion for a stay to the Board and the time the Board acted on the motion, Liberty Mutual filed a motion for an Emergency Stay and a Petition for Review with the Fifth Circuit on the grounds that the ALJ's decision violated the company's due process rights by depriving it of property without a hearing before an Article III court. We granted the Motion for an Emergency Stay, but, later vacated the stay because the Board had not yet

issued a final order.

In the meantime, the respondents contested the ALJ's award as inadequate. They initially filed a motion for reconsideration of the award on December 5, 1986, but later withdrew the motion and appealed to the Board on January 6, 1987. The ALJ granted the motion to withdraw on January 13, 1987. In April 1987, the Board dismissed the respondents' appeal as untimely.

The Director of the Office of Workers' Compensation Programs of the Department of Labor ("The Director of the OWCP") then filed a motion for reconsideration with the Board, urging that both the respondents' and Liberty Mutual's notices of appeal were premature. The Board denied the Director of the

OWCP's motion and after reviewing Liberty Mutual's appeal affirmed the ALJ's award.

The Director of the OWCP renews his earlier contention that Liberty Mutual's notice of appeal was premature and, accordingly, that the Board should have dismissed the appeal. If the Board erred in hearing Liberty Mutual's appeal, we do not have jurisdiction to review the case. To aid in the review of this issue, we have recited the operative dates:

11/25/86 the ALJ entered a judgment ordering Liberty Mutual to pay the respondents $130,000
12/3/86 Liberty Mutual filed a motion for a stay with the Board
12/5/86 the respondents filed a motion for reconsideration with the ALJ
12/8/86 the Board denied Liberty Mutual's motion for stay and stated it would consider the motion a notice of appeal
12/15/86 the respondents filed a motion to withdraw their motion for reconsideration
1/6/87 the respondents filed a notice of appeal
1/13/87 the ALJ granted the respondent's

motion to withdraw their motion for reconsideration
4/22/87 the Board dismissed the respondents' appeal

Our review is limited to the timeliness of Liberty Mutual's notice of appeal. The Board twice ruled on the timeliness issue. First, in response to the Director of the OWCP's motion for reconsideration, alleging that Liberty Mutual's notice of appeal was untimely, the Board denied the motion without stating its reasoning. Second, the Board ruled that the respondents' notice of appeal was untimely. Although the Board's dismissal of the respondents' appeal is not before us, the reasons the Board gave for dismissing their appeal are relevant to our review of the Board's decision to hear Liberty Mutual's appeal.

Because we do not know the grounds

on which the Board found Liberty Mutual's notice of appeal to be timely, we must turn to the applicable statute, the regulations passed pursuant to the statute, and the statements the Board made when reviewing the timeliness of the respondents' notice of appeal to discern the effect of a withdrawal of a motion for reconsideration on the time for filing a notice of appeal.

The statute governing appeals to the Board provides that:

> [a] compensation order shall become effective when filed in the office of the deputy commissioner ..., and, unless proceedings for the suspension or setting aside of such order are instituted ..., shall become final at the expiration of the thirtieth day thereafter.

33 U.S.C.A § 921(a). This statute is jurisdictional and there is no equitable relief available if a party fails to

object within the prescribed time period. Townsend v. Director, Office of Workers' Compensation Programs, 743 F.2d 880 (11th Cir. 1984).

Pursuant to the above statute, the Board promulgated regulations governing the effect of a motion for reconsideration on the time for filing a notice of appeal. The applicable regulations provide that "[a] timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner shall suspend the running of the time for filing a notice of appeal." 20 C.F.R. § 802.205A(a)(1987).[2] The regulation further provides that:

> [i]f a timely motion for

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[2]These regulations were later amended. We are relying on the regulations that were in effect at the time the Board rendered its decision.

> reconsideration of a decision or order of an administrative law judge or deputy commissioner is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed as premature. Following final action by the administrative law judge or deputy commissioner . . ., a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal.

20 C.F.R. § 802.205A(e)(1987).

As a preliminary matter, if the respondents had not withdrawn their motion for reconsideration and the ALJ had ruled on the merits of the motion, any notice of appeal filed prior to the judgment on the motion would have been premature. Jones v. Illinois Central Gulf Railroad, 846 F.2d 1099 (7th Cir. 1988). In the instant case, the respondents filed a perfected motion for reconsideration and later withdrew it. The issue before this

court is the effect of the respondents' withdrawal of their motion for reconsideration on the timeliness of Liberty Mutual's notice of appeal.

The Board provided two interpretations of the regulations when discussing the timeliness of the respondents' notice of appeal. First, the Board held that when a party files and subsequently withdraws a motion for reconsideration, the notice of appeal must be filed within 30 days of the original judgment from which the party seeks an appeal. Second, the Board held that even if the respondents' motion for reconsideration tolled the filing time for a notice of appeal, the respondents filed their notice of appeal before the ALJ ruled on their motion to withdraw and the

notice of appeal was, therefore, premature.

We find no support for the Board's statement that a perfected motion for reconsideration that is later withdrawn fails to toll the period for filing a notice of appeal. 20 C.F.R. §802.205A(e)(1987) explicitly states that "any appeal to the Board, whether filed prior to or subsequent to the filing of a timely motion for reconsideration, shall be dismissed as premature." The regulation makes no exception for motions for reconsideration that are later withdrawn. Furthermore, the Board's interpretation could render substantial injustice to the party opposing a motion for reconsideration. For example, if a party filed a motion for reconsideration,

the opposing party would read the regulation stating that any notice of appeal filed before resolution of the motion for reconsideration would be premature, and would then wait until the ALJ ruled on the motion for reconsideration before filing a notice of appeal. If the party moving for reconsideration later moved to withdraw the motion more than thirty days after the original judgment, under the Board's interpretation, the opposing party would lose the right to appeal.

The Board relies on Niswander v. Director, Office of Workers' Compensation Programs, 7 BLR 1-88 (1984), where the Board held that an unperfected motion for reconsideration cannot toll the time for filing a notice of appeal. Niswander is

distinguishable from the instant case. In Niswander, the party moving for reconsideration did not file a perfected motion. In the instant case, the plaintiffs filed a perfected motion detailing several grounds of alleged error. The plaintiffs' motion was not frivolous or lacking in substance.

We find more credibility in the Board's alternative interpretation that the time fore filing a notice of appeal is measured from the date that the ALJ ruled on the motion to withdraw the motion for reconsideration. The regulations governing the Board state that a notice of appeal filed before or after a motion for reconsideration is premature. The regulations further provide that "[f]ollowing final action by the

administrative law judge or deputy commissioner [dismissing or granting the motion for reconsideration], a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal." Although the regulation does not address the result when a legitimate motion for reconsideration is withdrawn, as compared to a motion granted or dismissed by the ALJ, we find the distinction between a withdrawn and a dismissed motion inapposite in this situation. In its alternative holding, the Board itself did not distinguish a withdrawn from a dismissed motion. Based on the above analysis, the Board held that the respondent's failure to file a notice of appeal within thirty days of the ALJ's ruling on the motion to withdraw the

motion for reconsideration precluded the respondents from obtaining review of the underlying judgment. Like the respondents, Liberty Mutual failed to file a new notice of appeal after the ALJ ruled on the motion to withdraw the motion for reconsideration. We see no reason why the Board's alternative interpretation should not apply equally to Liberty Mutual's notice of appeal.

We recognize that the rules and regulations of the Board deserve special deference. Jones, 846 F.2d 1099. We also recognize that this deference is not appropriate when the Board deviates from its own regulations. See Kephart v. Director, Office of Workers' Compensation Programs, 701 F.2d 22 (3rd Cir. 1983)(reversing the Board's dismissal of

an action on grounds of abandonment where the court found the Board's construction of the regulation erroneous); Grimmett v. Director, Workers' Compensation Programs, 826 F.2d 1015 (11th Cir. 1987)(reversing the Board's dismissal of an appeal as untimely where the Board measured the time for filing a notice of appeal from the date of the original judgment, not the date of the amended, final judgment); Pearce v. Director, Workers' Compensation Programs, 647 F.2d 716 (7th Cir. 1981)(reversing the Board where it failed to follow its own regulations); Youghiogheny & Ohio Coal Co. v. Benefits Review Board, 745 F.2d 380 (6th Cir. 1984)(reversing the Board's dismissal of an appeal where the Board did not abide by its procedural rules). As

this and other courts have repeatedly held, "[s]hould an agency in its proceedings, violate its rules and prejudice result, the proceeding are tainted and any actions resulting from the proceeding cannot stand." Hall v. Schweiker, 660 F.2d 116,119 (5th Cir. 1981), citing Pacific Molasses Company v. Federal Trade Commission, 356 F.2d 386 (5th Cir. 1966) and Alamo Express, Inc. v. United STates, 613 F.2d 96 (5th Cir. 1980). Here, the Board adhered to its own regulations when it dismissed the respondents' appeal on the grounds that they should have filed a new notice of appeal after the ALJ ruled on the motion to withdraw the motion for reconsideration; yet, the Board deviated from these same regulations when it found

Liberty Mutual's notice of appeal timely. We, thus, hold that the Board erred in hearing Liberty Mutual's appeal. For the foregoing reasons, we VACATE the Board's decision on the merits and DISMISS Liberty Mutual's appeal.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4280

TIDELAND WELDING SERVICE and
LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners

VS. NO. 88-4280

WALTER SAWYER, GLYNN RHODES and
DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS, U.S.
DEPARTMENT OF LABOR,
Respondents

Petition for Review of an Order of the
Benefits Review Board

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 08/24/89, 5th Cir. 198__,
_____ F.2d _____)

(September 18, 1989)

Before THORNBERRY, WILLIAMS and DAVIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-6